



October 7, 2002

Ms. Maria A. Salas-Mendoza
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2002-5641

Dear Ms. Salas-Mendoza:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172437.

The El Paso County Sheriff's Department (the "department") received a request for "all correspondence from the EEOC to the [department] received since Jan. 1, 1997." You state that you have released some of the requested information. You also state that you have withheld portions of the responsive information excepted from release under section 552.117(2) of the Government Code pursuant to a previous determination issued by this office in Open Records Decision No. 670 (2001). You claim that the remaining requested information is excepted from disclosure under sections 552.103 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter

is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You have submitted to this office various complaints filed with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination. This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). By showing that the complaints filed with the EEOC are pending, you have shown that litigation is reasonably anticipated with regard to these complaints. Our review of the records at issue also shows that they are related to anticipated litigation for purposes of section 552.103(a). Accordingly, you have established the applicability of section 552.103(a) to the information in exhibit B.

We note, however, that once the information in exhibit B has been obtained by all parties to the reasonably anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Here, the opposing parties in the reasonably anticipated litigation composed the submitted charge of discrimination forms. Accordingly, you may not withhold these charge of discrimination forms included in exhibit B. Additionally, you may not withhold any of the other documents we have marked in exhibit B seen by the opposing parties in the reasonably anticipated litigation under section 552.103. You may, however, withhold all information in exhibit B not seen by the opposing party pursuant to section 552.103. We point out that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

We also note that some of the information in exhibit B that you may not withhold under section 552.103 and some of the information in exhibit D is subject to section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The common-law right of privacy is incorporated into the Public Information Act by section 552.101. For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The *Ellen* court held that the identities of victims and witnesses of sexual harassment must be withheld pursuant to common-law privacy. *Id.* at 525. Pursuant to *Ellen*, the department must withhold the identities of the victims of alleged sexual harassment under common-law privacy. We have marked the information in exhibits B and D that must be withheld.

You next assert that some of the responsive information in exhibits B and D, which you have highlighted, is excepted from release under section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You state that you have only highlighted the personal information of employees who timely requested that their personal information remain confidential pursuant to section 552.024. Therefore, the department must withhold the home addresses and home telephone numbers of department employees that you have highlighted in exhibits B and D pursuant to section 552.117. In addition, the department must withhold the information we have marked.

In conclusion, you may withhold the information in exhibit B under section 552.103 with the exception of information seen by the opposing party in the reasonably anticipated litigation that we have marked. You must withhold information identifying the victims of alleged sexual harassment that we have marked in exhibits B and D under section 552.101 in conjunction with common-law privacy and *Ellen*. You must withhold the additional information we have marked and the highlighted personal information of department employees in exhibits B and D under section 552.117.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

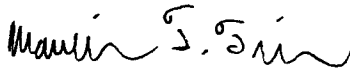
fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 172437

Enc: Submitted documents

c: Ms. Louie Gilot
El Paso Times
P.O. Box 20
El Paso, Texas 79901
(w/o enclosures)